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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

Pharmaceutical Research and Manufacturers of America, Plaintiff, vs. Stuart Williams, et al., Defendants.	No. 0:20-cv-01497-DSD-DTS **BRIEF AMICUS CURIAE OF THE GOLDWATER INSTITUTE**

INTEREST OF AMICUS

The interest of amicus is set forth in the accompanying motion for leave to file.

INTRODUCTION AND SUMMARY OF ARGUMENT

The arguments amicus Goldwater Institute made in its original amicus curiae brief (Docket no. 40) apply with equal force to this motion, and the Institute therefore reasserts those arguments here: the Insulin Act is a specious form of compassion which not only takes the Plaintiffs' property without just compensation, but is morally

indefensible because it is unjust to force Plaintiffs—who are not at fault in any way for the suffering of patients who need insulin—to shoulder the duty of producing insulin for those patients, without payment. *See id.* at Section II.

Rather than repeat those arguments here, amicus will address the defendants' "public nuisance" defense. That defense is baseless, in part because the concept of public nuisance—at least as employed by Defendants—is unconstitutionally vague. The reality is that no lawyer or judge can define the term "public nuisance," and in modern litigation it has become a term referring essentially to whatever the speaker chooses to characterize as bad. The term is so ill defined in modern law that it "fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits." *Hill v. Colorado*, 530 U.S. 703, 732 (2000). And the unprecedented idea that the pricing of a commodity can qualify as a public nuisance—which the state can remedy by simply seizing that commodity from its maker without payment—is a perfect example of why the unconstitutional vagueness of modern "public nuisance" is so dangerous.

ARGUMENT

I. Public nuisance is a dangerously vague concept and must be carefully limited to avoid abuse.

A. Due process requires that the law be clear enough that people can know what is forbidden.

A basic element of the rule of law is that the law must "convey[ ] sufficiently definite warnings as to the proscribed conduct," *State v. Duncan*, 605 N.W.2d 745, 748 (Minn. App. 2000), and must establish "minimal guidelines to govern law enforcement" to avoid giving officials the standardless power to "pursue their personal predilections." *In re Welfare of B.A.H.*, 845 N.W.2d 158, 163 (Minn. 2014) (citations and quotation marks omitted).

Although most cases involving the constitutional requirement of "definiteness," *id.* (citation omitted), have dealt with criminal statutes, the definiteness requirement also applies to civil matters that bear significant penalties, *Sessions v. Dimaya*, 138 S. Ct.

1204, 1212–13 (2018), and to common-law causes of action, including nuisance. For example, in *Grove Press Inc. v. City of Philadelphia*, 418 F.2d 82 (3d Cir. 1969), Pennsylvania authorities tried to use public nuisance doctrine to prohibit the showing of an allegedly obscene film. The court found that this violated the due process rule against vagueness. *Id.* at 87. Terms like "injury to the public" and "unreasonable" were "too elastic and amorphous" to satisfy the definiteness requirement, the court said; in fact, the court described public nuisance as a "sprawling doctrine" that "sweep[s] in a great variety of conduct under a general and indefinite characterization." *Id*. at 88 (citation omitted).

Similarly, in *Grayned v. City of Rockford*, 408 U.S. 104 (1972), a protestor was convicted of violating a noise-abatement ordinance that prohibited a person from making "any noise or diversion which disturbs or tends to disturb the peace or good order" of a nearby school campus. *Id*. at 108. The protestor claimed the law was unconstitutionally vague. While rejecting this claim, Justice Marshall explained that "a basic principle of due process" requires that the law "clearly define[]" its "prohibitions." *Id.*

As a matter of legal theory, it makes sense that the definiteness requirement would apply to public nuisance, because that concept occupies an ill-defined twilight zone between criminal and civil law. At common law, it was a criminal theory, *see State v. Lead Indus. Ass'n*, 951 A.2d 428, 444 (R.I. 2008), and it remains a criminal theory, or overlaps with criminal law, in Minnesota today. *See, e.g., City of Waconia v. Dock*, No. A19-1099, 2020 WL 1909700, at *1 (Minn. App. Apr. 20, 2020), *aff'd in part, rev'd in part*, 961 N.W.2d 220 (Minn. 2021); *City of W. St. Paul v. Krengel*, 768 N.W.2d 352, 354 (Minn. 2009). But even where *civil* law cases involve significant takings of liberty or property, due process requires clarity. *See Sessions*, 138 S. Ct. at 1212–13. The Supreme Court has, for instance, applied the definiteness requirement to purportedly "civil" law causes of action, including public nuisance, where they involve the imposition of monetary liability. *See BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003).

No less than statutes, common law legal theories—and defenses—must be guided by standards that allow people to know what is and is not sanctioned by law. Some jurisdictions have ruled that a greater degree of vagueness is tolerable in the realm of business regulations than in other areas, *City of Minneapolis v. Reha*, 483 N.W.2d 688, 691 n.3 (Minn. 1992), but this case does not involve a business regulation, and the rule is plain that "the most explicit" form of definiteness is required when the law "threatens constitutionally protected rights," as is the case here. *Id*. at 692. And even in the realm of business regulations, courts have made clear that "fair warning should be given to the world in language that the common world will understand" of what the law will punish. *Arthur Andersen LLP v. United States*, 544 U.S. 696, 703 (2005) (citations omitted). As Justice Gorsuch recently noted, there is no justification for allowing vague civil law—whether statutory or common law—while vigilantly prohibiting vagueness in other realms. *Sessions*, 138 S. Ct. at 1231 (Gorsuch, J., concurring) (there is "no good [reason]" why "due process require[s] Congress to speak more clearly" in a criminal case "than when it wishes to subject a citizen to indefinite civil commitment, strip him of a business license … or confiscate his home[.]").

B. Nobody knows what a public nuisance is.

"[N]o other [legal concept] is as vaguely defined or poorly understood as public nuisance." D.G. Gifford, *Public Nuisance As A Mass Products Liability Tort*, 71 U. Cin. L. Rev. 741, 774 (2003). The term "has meant all things to all people, and has been applied indiscriminately to everything from an alarming advertisement to a cockroach baked in a pie. There is general agreement that it is incapable of any exact or comprehensive definition." *Prosser and Keeton on Torts* § 86 at 616 (5th ed. 1984). The precedent regarding public nuisance has been described as a "'wilderness,'" H.G. Wood, *The Law of Nuisances* iii (3d ed. 1893); an "'impenetrable jungle,'" Prosser and Keeton, *supra*; a "mystery," W.A. Seavey, *Nuisance: Contributory Negligence and Other Mysteries*, 65 Harv. L. Rev. 984, 984 (1952); a "legal garbage can," W.L. Prosser, *Nuisance Without Fault*, 20 Tex. L. Rev. 399, 410 (1942); and a "quagmire," J.E.

Bryson & A. MacBeth, *Public Nuisance, The Restatement (Second) of Torts, and Environmental Law*, 2 Ecology L.Q. 241, 241 (1972).

According to the California Supreme court, the term public nuisance "does not have a fixed content." *People v. Lim*, 18 Cal.2d 872, 880 (1941). Legal scholars have called it a "mongrel" doctrine "intractable to definition," F.H. Newark, *The Boundaries of Nuisance*, 65 L.Q. Rev. 480, 480 (1949), and Justice Blackmun said that courts have "searche[d] in vain" for "anything resembling a principle in the common law of nuisance." *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1055 (1992) (Blackmun, J., dissenting).

Here, the state's public nuisance argument is typical of this sort of vagueness. Instead of citing any particular acts or omissions by the medicine makers, the state instead offers inflammatory rhetoric: it concedes that "insulin itself does not create a nuisance," but claims that the "greedy, unethical, and potentially illegal acts" of companies that make and sell it have "caused a nuisance in the form of the insulin affordability crisis." Doc. 66 at 24–25. This is the sum total of its specifications regarding public nuisance.

"Greedy," of course, is simply a term of abuse. Indeed, the state uses it in exactly the manner Ambrose Bierce had in mind when he defined "selfishness" as "devoid of consideration for the selfishness of others." *The Devil's Dictionary* 318 (1911). *See also* Thomas Sowell, *Barbarians Inside the Gates* 250 (1999) (noting the perversity whereby "it is 'greed' to want to keep the money you have earned but not greed to want to take somebody else's money."). If anyone is being greedy here, it is the state—which seeks to deprive insulin makers of their rightful property without payment.

Of course, manufacturers have every right to charge what they wish for the products they make—just as consumers are free to refuse that price. *Cf. Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 274 n.12 (2d Cir. 1979) ("[businesses are not] ordinarily precluded from charging as high a price for [their] product[s] as the market will accept. True, this is a use of economic power[.] … But high prices, far from

damaging competition, invite new competitors into the monopolized market."). This is as true in the medical market as any other. *J. Allen Ramey, M.D., Inc. v. Pac. Found. For Med. Care,* 999 F. Supp. 1355, 1364 (S.D. Cal. 1998) ("Plaintiff [doctor] is free to charge whatever prices he can command.").

The immoral and unethical thing to do is to use the government's coercive powers to simply take the manufacturer's products by force—and without compensation—thereby to pay for politicians' counterfeit compassion with other people's money. As political thinkers have recognized for centuries, taking someone's property "is on a par with forced labor," Robert Nozick, *Anarchy, State, and Utopia* 169 (1974), because it is the equivalent of taking away the labor that the rightful owner spent in producing that property. There is no distinction between forcing the Plaintiffs to give away the insulin they have made, and compelling them to make insulin against their will without payment—and this equivalency cannot be brushed aside with the epithet "greed."

In any event, it's clear that "greed" cannot be made the basis of a legal claim or defense because there is no ascertainable and objective standard of what constitutes "greed."[1] The term is as vague as the term "suspicious," which was found to be unconstitutionally vague in *Palmer v. City of Euclid*, 402 U.S. 544 (1971), and it is vaguer than a law prohibiting "advising or teaching the doctrine that organized government should be overthrown by force," which was found unconstitutionally vague in *Keyishian v. Bd. of Regents*, 385 U.S. 589, 599 (1967). If "greed" can be made the basis of a public nuisance charge (to be remediated by the uncompensated seizure of the "offender's" property), then there can be no security for any property owner whatsoever.

[1] True, the word has a common meaning. In *Commonwealth v. Wax*, 571 A.2d 386, 392 n.8 (Pa. Super. Ct. 1990), for example, a Pennsylvania court adopted the dictionary definition of "greed" as "a 'selfish desire to acquire more than one needs or deserves.'" But here, the state is guilty of that, not the Plaintiffs, since the state is trying to take something it has no right to—something that Plaintiffs put the time and effort into making—without paying for it.

As to "unethical," Doc. 66 at 24, as noted above, it is the state, not the Plaintiffs, who are acting unethically. Ethical philosophy shows that an individual or business has a moral right to the products it creates. Four centuries ago, John Locke observed that everybody has "a *property* in his own *person*," which means that "[t]he *labor* of his body and the *work* of his hands…are properly his." Thus, when a person makes something out of the raw materials of nature, "he has mixed his labor with it, and joined to it something that is his own, and thereby makes it his property." John Locke, *Second Treatise of Civil Government* § 27 at 328-29 (P. Laslett rev. ed., 1963) (spelling modernized)).

Or, as the Minnesota Supreme Court has put it, "[w]hat one creates by his own labor is his. Public policy does not intend that another than the producer shall reap the fruits of labor. Rather it gives to him who labors the right by every legitimate means to protect the fruits of his labor and secure the enjoyment of them to himself." *Granger v. Craven*, 199 N.W. 10, 12 (Minn. 1924). *See also Winston & Newell Co. v. Piggly Wiggly Nw. Inc.*, 22 N.W.2d 11, 15 (Minn. 1946) ("[E]very one has the undoubted right to sell his own goods, or goods of his own manufacture." (citation omitted)).

Who seeks equity must do equity, *Burnes v. Burnes*, 137 F. 781, 791 (8th Cir. 1905), and the state's effort to seize Plaintiffs' rightful property by force, without paying for it, under the guise of compassion, means they cannot ask this Court for equitable relief.

As to the "potentially illegal acts" the state cites as the basis of a public nuisance, Doc. 66 at 24, this is a baseless insinuation. The state offers no argument that the Plaintiffs have acted illegally; indeed, it uses the word "potentially" as an *insinuation*. An insinuation is a rhetorical device whereby wrongdoing is hinted at or implied, without an explicit (and thus, refutable) accusation—and it is universally considered inappropriate for state attorneys to engage in it. *See, e.g.*, *State v. Harris*, 521 N.W.2d 348, 354 (Minn. 1994); *State v. Cornell*, 878 P.2d 1352, 1369 (Ariz. 1994); *United States v. Corona*, 551 F.2d 1386, 1390 (5th Cir. 1977). If the state believes the Plaintiffs

have engaged in illegal acts, it has the duty to file criminal charges, not to seize the Plaintiffs' property without proof—or even an allegation.

The state's lack of objective allegations and its reliance on rhetoric and innuendo—to cast blame upon the victim of its uncompensated property seizure—demonstrates why the "public nuisance" concept is so dangerous. Absent some kind of objective guideline, the doctrine becomes a vague catch-all accusation of "bad conduct" which can rationalize any action by the state. That is precisely what the void for vagueness concept forbids.

Courts frequently employ "saving constructions" to avoid declaring a law void for vagueness. In *Skilling v. United States*, 561 U.S. 358 (2010), for example, the Supreme Court adopted a limited interpretation of the federal "honest services fraud" statute so as to avoid concluding that the statute was unconstitutionally vague. *Id*. at 411–12. The authors of the *Restatement (Second) of Torts* (1998) made a similar effort to define public nuisance as conduct "actionable under the principles controlling liability for negligent or reckless conduct or for abnormally dangerous activities." *Id*. at § 821B cmt. e. Such limits are important because "[t]he handful of principles governing the tort of public nuisance were never intended to govern any unreasonable harm that might result from human interaction, nor are they adequate for such a daunting task." Gifford, *supra*, at 833. And they are important to prevent public nuisance from being exploited as a legal weapon against any activity that a public official decides contributes to a bad state of affairs. But the state offers no such limiting construction here, and none is evident that would cabin the theory of public nuisance at which the State does not even fully articulate.

II. States have often attempted to abuse "public nuisance" due to its vagueness—and courts have said no.

The danger of an overbroad definition of public nuisance is plain. Absent objective rules limiting liability, that concept can become a catch-all rule against

whatever public officials, or even members of the public, decide is bad behavior, for political advantage or financial gain.

In several states, public officials have sued gun manufacturers on the theory that the sale of firearms—even though perfectly lawful—is a public nuisance because it contributes to violence. In *James v. Arms Tech., Inc.*, 820 A.2d 27 (N.J. Super. Ct. App. Div. 2003), the court allowed a public nuisance suit against gun manufacturers on the grounds that gun makers "foster[ed] an illegal secondary gun market," *id*. at 52, and that this caused the government to spend money to provide "governmental services associated with gun violence." *Id*. at 33. The court found that simply selling firearms which people later used to commit crimes made the manufacturers participants in "an illegal, secondary market" for guns that harmed the public generally, *id*. at 53 (citation omitted)—even though the gun makers violated no laws. Likewise, in *Cincinnati v. Beretta U.S.A. Corp*., 768 N.E.2d 1136, 1141–44 (Ohio 2002), the Ohio Supreme Court allowed such a case to proceed.

The California attorney general sued General Motors on a public nuisance theory, arguing that selling cars constituted a public nuisance, despite the fact that cars are legal, because cars contribute to environmental pollution. That case was dismissed, *People v. Gen. Motors Corp*., No. C06-05755 MJJ, 2007 WL 2726871 (N.D. Cal., Sep. 17, 2007), but a similar case in the Fifth Circuit, brought by landowners who claimed that oil companies contributed to global warming and thereby worsened the effects of hurricanes—and that this led to the damage of their properties—was allowed to proceed. *Comer v. Murphy Oil USA*, 585 F.3d 855 (5th Cir. 2009). And the California Court of Appeal allowed plaintiffs to sue paint companies on a public nuisance theory for having sold lead paint when that was legal, on the grounds that homes that were allowed to deteriorate now present environmental hazards. *People v. ConAgra Grocery Prods. Co*., 227 Cal. Rptr. 3d 499 (App. 2017). There have even been efforts to sue McDonald's on the grounds that the sale of fast food is a "public nuisance" because it leads to obesity. *Pelman v. McDonald's Corp*., 396 F.3d 508 (2d Cir. 2005).

Such abuses have led the Illinois, Rhode Island, and Oklahoma Supreme Courts to warn against expanding the concept of public nuisance to impose liability on manufacturers for the general social harms associated with their products. In *City of Chicago v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099, 1124–25 (Ill. 2004), the city sued gun makers for selling guns because they contributed to the problem of gun violence. The court rejected the argument. It began by noting that because "the concept [of public nuisance] 'elude[s] precise definition,'" *id.* at 1110, courts must insist upon objective proof of *causation* and *control*—that is, proof the defendant caused the harm and/or controlled the persons or things that caused the harm. *Id.* at 1127–32. To do otherwise would risk "impos[ing] public nuisance liability for the sale of a product that may be possessed legally by some persons, in some parts of the state." *Id.* at 1121. Similarly, the Rhode Island Supreme Court refused to hold paint manufacturers liable for having made lead paint (at a time when it was legal) based on the later environmental harms it causes. To exploit the vagueness of public nuisance in this way would transform it into "'a monster that would devour in one gulp the entire law of tort.'" *Lead Indus. Ass'n*, 951 A.2d at 457 (citation omitted).

In *State ex rel. Hunter v. Johnson & Johnson*, 499 P.3d 719 (Okla. 2021), the Oklahoma Supreme Court rejected an effort to hold pharmaceutical companies liable for the social harms caused by over-prescription of painkillers. It held that public nuisance has traditionally involved "a violation of a public right," and this term must be defined with reasonable narrowness—not as synonymous with "an aggregate of private rights by a large number of injured people." *Id.* at 726. To interpret "public right" as meaning a "right to be free from the threat that others may misuse or abuse prescription opioids," would create a rule whereby "manufacturers, distributors, and prescribers [would be] potentially liable for all types of use and misuse of prescription medications," which would not only be unjust but would deprive suffering patients of medicines they need. *Id.* at 727.

The state's theory here is even worse than that which these courts rejected. To hold that "high priced" medicines are a public nuisance would expand the concept of public right to such a degree that car makers, landlords, clothing manufacturers, hotel owners, restaurants, and every other business could face liability whenever they charge for their goods and services more than what political leaders consider desirable—and would expose them to uncompensated confiscation of their property. That would be unprecedented,[2] unjustifiable, and unwise. As in the *Hunter* case, it would mean that patients who need other medicines that Plaintiffs make, would be forced to pay more for those medicines in order to make up the cost imposed by the state's confiscation of insulin. The threat of confiscation would deter innovation and improvement in medical products and services in Minnesota. And it would violate the first principle of takings law, which holds that the government should not be free to "forc[e] some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

III. The precedents the state cites to support its "public nuisance" theory don't support that theory.

Instead of offering facts or argument to support its novel public nuisance theory, the state cites cases involving regulatory burdens impose don businesses that have caused some sort of harm. None of these support the state's position.

In *Usery v. Turner Elkhorn Mining Co*., 428 U.S. 1 (1976), a federal law required mining companies to compensate miners who suffered lung disease from working in coal mines. The case did not involve the seizure of property, like this one does, and there was no question of taking or compensation. So that case is not relevant.

Atchison, T. & S. F. Ry. Co. v. Pub. Utilities Comm'n of Cal., 346 U.S. 346 (1953), involved a law requiring railroads to pay part of the cost of improvement to their

[2] Of course, an alternative always exists: eminent domain. States have often used eminent domain to take property for public benefits, including such broadly defined benefits as mere amusement. *See, e.g., City of Oakland v. Oakland Raiders*, 646 P.2d 835 (Cal. 1982). But that route would, again, require just compensation.

tracks—it again involved no seizure of property or question of compensation. In fact, the railroads conceded "the right of the Commission to enter the orders [and] the reasonableness of the estimated costs," *id*. at 352, which is hardly true here. The question was simply whether the method of allocating the costs was reasonable. The Court said it was, which meant *there was no taking*. But there is a taking here, so this case, too, is irrelevant.

Connolly v. Pension Ben. Guar. Corp., 475 U.S. 211 (1986), also involved no physical taking. There, regulations governing pension plan operations were applied in a way that required employers to pay amounts they believed unjustifiable and which they called a *regulatory* taking. The Court said it was not a taking, in part because "the United States has taken nothing for its own use," but had instead "impos[ed] an additional [financial] obligation" on parties to a contract "that is otherwise within the power of Congress to impose." *Id*. at 224. Here, by contrast, Minnesota *is* taking something for its own use—or, rather, for the use of other individuals. It is physically seizing Plaintiff's products. Thus *Conolly* is, again, irrelevant to a physical takings case like this.

Notably, none of these cases involved any finding of public nuisance, let alone reached the conclusion that the uncompensated physical seizure of property is constitutional if done in response to a public nuisance. Instead, these cases involved regulations of businesses, and the age-old question of whether the financial burden those regulations imposed went "too far" and thus crossed the line into a compensable taking. *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). But as the Court made clear in *Horne v. Dep't of Agric*., 576 U.S. 350, 360–61 (2015), the kind of line-drawing *Mahon* calls for does not apply where the government is confiscating physical property.

The only case the state cites that involves property being taken in response to a nuisance is *Miller v. Schoene*, 276 U.S. 272 (1928), which held that the state was within its rights to destroy trees infected with a communicable plant disease. That was a routine application of the ancient rule that property which *is itself a danger to the public*

can be destroyed under the police power in order to protect public safety. *See also Surocco v. Geary*, 3 Cal. 69, 73 (1853). But the Defendants here concede that "the insulin itself does not create a nuisance." Doc. 66 at 24. Since the state disclaims that theory in its brief, it cannot rely on *Schoene*.

What's more, the theory of *Scheone* was that "[t]he only practicable method of controlling the disease and protecting apple trees from its ravages is the destruction of all red cedar trees, subject to the infection, located within two miles of apple orchards." 276 U.S. at 278–79. But here, there are practicable alternatives: most obviously, the state can *pay* for the medicine it wishes to give away. That is the method the Constitution calls for.

CONCLUSION

No case in legal history has suggested that the state may declare high prices a public nuisance, and use that as an excuse to simply take property from manufacturers without paying for it. On the contrary, our constitutional system was designed to prevent such abuses. The Plaintiff's motion for summary judgment should be *granted*.

RESPECTFULLY SUBMITTED this 20th day of July, 2023 by:

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CERTIFICATE OF SERVICE

Document Electronically Filed and Served by ECF this 20th day of July, 2023.

/s/ *Timothy Sandefur*
Timothy Sandefur